No. 1216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

THE ATHERTON MILLS,

Appellant,

vs.

EUGENE JOHNSTON, JOHN W. JOHNSTON, by EUGENE T. JOHNSTON, His Next Friend,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR APPELLEES.

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THE ATHERTON MILLS, Appellant, vs. EUGENE JOHNSTON, John W. Johnston by Eugene T. Johnston, his next friend, Appellees.	No. 406.

BRIEF OF APPELLEES.

Statement of Case.

This is an appeal by the defendant in the court below from a judgment of the District Court for the Western District of North Carolina, rendered May 2, 1919, holding unconstitutional and void such part of the Federal Revenue Act of February, 1919, as imposes, or seeks to impose, a 10 per cent. tax, additional to all other taxes, on the profits arising from the sale or disposition of the products of mines, quarries, mills, canneries, workshops, factories or manufacturing establishments which, at any time during the year (first tax year beginning April 25, 1919), shall have employed, or permitted to work, children under the age of fourteen years at all, or children between the ages of fourteen and

sixteen years for more than eight hours in any day or more than six days in any week, or after the hour of 7 o'clock P. M. or before the hour of 6 o'clock A. M.

The suit was brought by a complaint filed April 15, 1919 (Record, p. 1) by a father and son, both employees in a cotton mill located at Charlotte, North Carolina, to-wit: the mill of the defendant. The complaint, besides the formal allegations, alleged that the father had in his home and custody his son over the age of fourteen years but under the age of sixteen years; that they both, father and son, were employed in the cotton mill of the defendant company; that the minor son was in good health and capable of performing the services required of him; that the work of said minor had been entirely satisfactory, but that, solely on account of the said statute aforesaid and its imminent application, the defendant had notified said minor and his father that, being compelled under the terms of the statute to curtail the hours of the minor employee in such a way as to disturb and embarrass the operation of the mill, it had concluded to discharge minor plaintiff, and all minors under sixteen, to the pecuniary loss of the plaintiff father, who was a man of small means with a large family, to whom the receipt and use of the compensation arising from the service of the minor son was essential for the comfortable support and maintenance of the family, including said minor son; that the curtailment of hours meant in itself a curtailment of pay, in view of the fact that the work done by the minor was piece-work, and the discharge of the minor son involved only additional pecuniary loss.

The complaint alleged the unconstitutionality and invalidity of the statute, and that intended obedience to it by the defendant was directly and

solely responsible for the threatened invasion of the property right of the plaintiff father in the loss of the labor and wages of said minor son, and for the invasion also of the right of the minor plaintiff who desired to continue in cotton mill work as his life vocation. The complaint sought an injunction against the defendant to prevent the discharge or curtailment of pay of the minor plaintiff on account of the going into effect of the said statute (Record, pp. 1-6).

The defendant cotton mill company (The Atherton Mills) answered the complaint, admitting all the allegations except the allegation of unconstitutionality and invalidity of the statute in question *which invalidity and unconstitutionality it expressly denied.* It expressly admitted that it contemplated the discharge of the said minor plaintiff before the law by its terms went into operation, to-wit: April 25, 1919, the beginning of the taxable year, and that such discharge would be solely to comply with the statute (Record, pp. 8-10).

Upon the filing of the complaint the defendant and the plaintiffs gave notice thereof to the Commissioner of Internal Revenue, the Solicitor General, and the United States District Attorney, and that the hearing was set for April 16, 1919; at that hearing the United States District Attorney appeared as *amicus curiae,* but the Court, in order to give further time for the consideration of the matter by the District Attorney and the Solicitor General, adjourned the motion for the injunction to May 2, 1919, in the meantime granting a preliminary injunction as prayed by the bill (Record, p. 11).

At the further hearing upon the bill, the District Attorney appeared, again as *amicus curiae,* and

suggested a want of jurisdiction in the Court in that there was no allegation in the complaint of a contract preventing the defendant from discharging the minor plaintiff for any reason that might seem fit to it, and because the case was not one arising under the Internal Revenue Law. These motions were overruled, and the Court further held that the Act of Congress referred to in the complaint was unconstitutional and without the power of Congress to enact, and gave an injunction (Record, p. 12).

The defendant (The Atherton Mills) petitioned for appeal to this Court, which was allowed (Record, pp. 15-16). Petition to advance the case has been filed on behalf of the appellees, and expressly concurred in by the Solicitor General, as well as by counsel for the appellant, on the grounds stated in the motion to advance, to wit: the public interest in a decision on the constitutionality of the Act, in view especially of the previous decision of this Court holding invalid the so-called "Child Labor Law" of 1916, and the convenience to the departments of government, including the Department of Justice and the Department of Internal Revenue, in having an early decision of the constitutional question involved. The Solicitor General has made application, with the concurrence of counsel for the other parties, and the Court has ordered, that he be permitted to file brief and participate in the oral argument on behalf of the United States, to argue the constitutionality of the statute—this in addition to the argument to be made by appellant.

The Solicitor General in joining in, and making as his own, the motion to advance the case, and in his brief, does not question the jurisdiction of the

Court, nor seek to secure a reversal of the judgment of the Court below except on the merits of the question involved, to wit: the constitutionality of the statute.

This method of testing the validity of the statute is adequate, and if the statute is unconstitutional the judgment should be affirmed.

In the case of *Truax vs. Raich* (239 U. S., 33) an employee brought a suit against the employer and the Attorney General of the State of Arizona upon the allegation that because of the going into effect of a statute of the State the employer was about to discharge the plaintiff; that the statute involved was a void statute; and the action sought an injunction against the employer and the Attorney General of the State charged with the enforcement of the statute alleged to be void. The jurisdiction of the Court was attacked, but this Court held that the right to earn a livelihood, and to continued employment, unmolested by the enforcement of a void statute, is a right entitled to protection in equity, even though the contract of employment was at will. While the *Truax* case was an action brought against the employer, and the prosecuting officer of the State, charged with the enforcement of the *State* statute alleged to be void, whereas the present suit is brought on the allegation that a *United States* statute is void, it is clear that this difference involves no distinction: The "Child Labor Law" of 1916, passed by Congress under what it deemed its constitutional power to regulate interstate commerce, was declared unconstitutional by this Court in a suit brought by a minor employee and his father against the employer and the United States District Attorney (*Hammer vs. Dagenhart*, 247 U. S., 251).

It is true that the statutes considered in *Truax vs. Raich* (*supra*) and *Hammer vs. Dagenhart* (*supra*) were criminal statutes, and that the statute here involved is in form a revenue statute. It is true also that the United States statutes (Revised Statutes, Sec. 3224) provide that there shall be no injunction against the collection of taxes. It has been distinctly held, though, that, while an injunction will not lie against the collecting authorities to prevent the collection of a Federal tax, an injunction will lie at the suit of one who would be injuriously affected, against the taxpayer, to prevent the taxpayer complying with the statute, if it is void. The point was fairly presented in *Brushaber vs. Railroad Co.* (240 U. S., 1), in which the validity of the income tax law was attacked. In that case a stockholder of the railroad company filed a bill to enjoin the corporation from complying with the income tax law, Act of 1913. The Court, in discussing the propriety of the action, said:

> "The right to prevent the corporation from returning and paying the tax was based upon many averments as to the repugnancy of the statute to the Constitution of the United States, of the peculiar relation of the corporation to the stockholders and their particular interests resulting from many of the administrative provisions of the assailed act, of the confusion, wrong and multiplicity of suits and the absence of all means of redress which would result if the corporation paid the tax and complied with the act in other respects without protest, as it was alleged it was its intention to do. To put out of the way a question of jurisdiction we at once say that in view of these

averments and the ruling in *Pollock vs. Farmers Loan & Trust Co.*, 157 U. S., 429, sustaining the right of a stockholder to sue to restrain a corporation under proper averments from voluntarily paying a tax charged to be unconstitutional on the ground that to permit such a suit did not violate the prohibitions of Section 3224 Revised Statutes against enjoining the enforcement of taxes, we are of opinion that the contention here made that there was no jurisdiction of the cause since to entertain it would violate the provisions of the Revised Statutes referred to, is without merit" (pp. 9-10).

The case at bar, then, not being a suit to enjoin the collecting authorities from collecting a tax, is not within the provisions of Sec. 3224, Revised Statutes.

We are left only to inquire whether this Court, of its own motion, will be astute to find and declare, (in order to dismiss this case, which all parties, and the United States, earnestly desire to be decided on its merits, to wit: on the validity or invalidity of the statute in question), that the complaint states no cause of action cognizable in equity. It might have been argued that there was wanting a basis for equitable relief in the complaints filed in the *Brushaber* Case (*supra*), and in the *Pollack* Case (*supra*) referred to in it, because no allegations were made of insolvency of directors or officers, nor of impossibility of securing by legal proceedings a refund of taxes improperly paid. The Court did not look upon the bills of complaint filed in those cases with so technical and critical an eye. It is to be noted in this case that the defendant employer does not defend by a claim of a right to discharge for a good

reason, or a bad reason, or no reason at all; it does not claim a right to discharge because of an unwillingness to offend even an unconstitutional statute; it bases its immediately contemplated discharge of minor plaintiff on its assertion of a statute which, it alleges, is constitutional and valid. The practical condition of the minor plaintiff and his father is to be considered. By virtue of the judgment of the lower Court the minor plaintiff has been undisturbed in the enjoyment of his employment, and the father in the enjoyment of his wages, but if jurisdiction had been denied by the lower Court the minor plaintiff would have unavoidably lost his employment, and the father plaintiff the wages of the minor, directly because of the operation of an unconstitutional law. These are positive rights, and a court of equity, dealing as it does with substance and not with form, should stand ready to protect them. In *McCabe vs. Railway Company* (235 U. S., 151) the Court held, quoting from the syllabus: "* * * Complainants must show a per-"sonal need of an injunction, and that where none "of the complainants had been refused accommo-"dations (the case involved the constitutionality of "the Oklahoma separate coach law), or had been no-"tified that he would be so refused when the Act "went into effect, his suit could not be maintained." In this case the plaintiff shows his absolute need of on injunction and shows that he had been notified that he would be turned out of employment when the Act went into effect.

In the *McCabe Case,* just referred to, while the Court dismissed the bill of complaint, it declared the statute whose validity was attacked constitutional and valid in some respects, and unconstitutional and invalid in other respects. The Attorney

General of the State of Oklahoma appeared in that case, to maintain the constitutionality of the statute, as the Solicitor General of the United States appears in this. In the *Brushaber* Case (*supra*), where the jurisdiction was sustained, this Court adverted to the fact that in the argument of that case counsel for the United States Government was present and participated as *amicus curiae,* thus implying, as it would seem to us, that with the certainty that full argument in favor of the validity of the law would be made in any event, no practical advantage could come from any technical disposition of the litigation. Precisely the same situation and the same assurance of full argument exist in the case at bar.

Statement of Question Involved.

The only question involved in this case is whether the Act of Congress referred to is within the constitutional authority of Congress to enact.

The statute is Title XII of the Federal Revenue Act of 1918 (ratified, though, in February, 1919), which Revenue Act imposes large taxes on incomes and profits of individuals and corporations. The Act itself, in substantially all its parts, is undeniably, as its title imports, "An Act to raise revenue." Title XII, Sec. 1200, imposes a tax of 10 per cent., additional to all other taxes imposed by the Act, or any Act, on the entire net profits received or accrued during each year, the first taxable year to begin April 25, 1919, from the sale or disposition of the product of any mine, quarry, mill, cannery, workshop, factory or manufacturing establishment that employs or permits the working of children during any portion of the taxable year otherwise

than in accordance with the schedule permitted by said Act, to wit: children under the age of fourteen at all, or children between the ages of fourteen and sixteen, more than eight hours in any day or more than six days in any week, or after 7 o'clock P. M. or before 6 o'clock A. M. These taxes are to be, by the terms of the Act, collected as all other taxes—that is, upon reports made by the taxpayers in accordance with regulations to be issued by the Treasury Department.

The plaintiff's contention is that this section 1200 of Title XII of the Act of February, 1919, is beyond the powers delegated to Congress by the United States Constitution, and is, therefore, in violation of the Tenth Amendment to the Constitution which reserves to the States respectively, or to the people, powers not delegated to the United States.

ARGUMENT.

I.

That this Statute is unconstitutional is determined by the decision of this Court (Hammer vs. Dagenhart, 247 U. S., 251) declaring the Child Labor Law of 1916 unconstitutional.

In *Hammer vs. Dagenhart,* the act prohibiting the shipment in interstate or foreign commerce of any product of a mill situated in the United States, in which, at any time during the period of thirty days before the removal of the product, children under fourteen had been employed, or children between fourteen and sixteen had been employed

more than eight hours in a day or more than six days in any week or between seven in the evening or six in the morning, was held unconstitutional as exceeding the commerce power of Congress and invading the powers reserved to the States. We quote from the decision at page 275:

> " * * * The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *Pipe Line Case,* 234 U. S., 548, 560. The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters entrusted to the Nation by the Federal Constitution.
>
> "In interpreting the Constitution it must never be forgotten that the Nation is made up of States to whch are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County vs. Oregon,* 7 Wall, 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general Government. *New York vs. Miln,* 11 Peters, 103, 139; *Slaughter House Cases,* 16 Wall., 36, 63; *Kidd vs. Pearson, supra.* To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and

over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.

"We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This Court has no more important function that that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority Federal and State to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

"In our view the necessary effect of this Act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the Act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far reaching result of upholding the Act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."

Against this holding of the Court, and so rejected by the Court, the Government contended that the statute then being considered was valid because it had been passed by Congress in the exercise of its right to regulate interstate commerce, and was, in form at least, and in language, a clear and typical regulation of interstate commerce. By its terms, it was said, the statute applied only to the movement of goods between the States, and its effect, or reaction, on domestic affairs was only indirect. It was contended that in this condition to argue unconstitutionality was in effect to attack the good faith of Congress. To quote from the brief of the Government in this Court with respect to the statute considered in the *Dagenhart Case*:

> "That it is a regulation such as it purports to be is clear if the plainest and most unambiguous language can make it so. Contention to the contrary is in effect an attack upon the good faith of Congress, and invites the Court to assume that the language used, notwithstanding its explicit character, is a mere pretense in order to cloak an usurpation of State power to make local police regulations. The Act, however, must be read as it is written. Its character as a regulation can only be denied by reasserting the now obsolete doctrine that the power to regulate does not embrace the power to exclude designated articles from the channels of commerce." (*Government's Brief, Dagenhart Case,* pp. 9-10.)

This Court held against that contention, in language hereinbefore quoted, and consideration of the language of the dissenting opinion in the *Dagenhart Case,* in connection with the language of the

opinion of the Court already quoted, serves to emphasize the deliberate denial by the majority of this Court of the validity of the Government's contention.

By the same Section of the same Article of the United States Constitution under which Congress derives its right to regulate commerce among the several States, Congress is given the right: "To "lay and collect taxes, duties, imposts and excises, "to pay the debts and provide for the common de- "fense and general welware of the United States." As soon after the decision of the Supreme Court of the United States hereinbefore referred to as Congress could get to the matter, it passed the statute that is now involved. Of course the statute was not intended to raise revenue. Of course it was intended to lay down the will of Congress as to the employment of children, and to coerce employers of children to conform their conduct to this will. Congress has once more attempted to average the conditions of climate, wealth and racial content of the various States, and to impose upon those States, and their inhabitants, the Congressional view as to the employment of children in factories and mines. The question before this Court in this case, then, is whether, a resort to the Interstate Commerce Clause of the Constitution having failed, Congress may, by a resort to the Tax Clause of the same instrument, control the entire policy of a State, and so open the door to the complete nationalization of our Government, so ardently desired by some of the publicists of our day. This is an interesting and an important case, because upon its result depends the question whether the *Dagenhart Case*

and its decision was a real, or merely a temporary and *pro forma*, assurance of the continuance unimpaired of State authority over "matters purely local."

The Court in the *Dagenhart Case*, it would seem even to the careful reader, rendered its opinion in the pending case:

> "Thus the Act (passed under the authority of the Interstate Commerce Clause of the Constitution) in a *two-fold* sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, *but also exerts a power as to a purely local matter to which the Federal authority does not extend.*" (*Italics ours.*)

II.

The Statute, though forming a part of what is otherwise a revenue law, is not a taxing statute, but is an attempt to regulate—in a field in which Congress has no regulatory power.

The Court in the *Dagenhart Case* reaffirmed the well settled, but never to be forgotten, doctrine succinctly announced in *Collins vs. New Hampshire* (170 U. S., 30, 33-34):

> "The direct and necessary result of the statute must be taken into consideration in deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effects."

Looking only at the statute itself, with no light *de hors* the statute itself, it is quite impossible for a reasonable mind to conclude otherwise than that it is in its direct and necessary result—in its natural and reasonable effect—a regulation of the hours of labor permitted in factories and mines. It is not a tax at all; it is an attempt by Congress to "exert a "power as to a purely local matter to which the "Federal authority does not extend."

The discussion in the Senate of this measure, more or less hurried, of course, since it was the discussion of a single provision of a great revenue bill, and since no one expected any revenue from this particular provision, confirms, if confirmation were needed, what the statute itself reveals. Senator Lodge, favoring the provision, said:

> "The amount of revenue to be raised by this measure may be little or nothing. The main purpose is to put a stop to what seems to be a very great evil, and one that ought to be in some way put a stop to." (*Congressional Record*, Vol. 57, No. 16, p. 619.)

Senator Simmons, Chairman of the Finance Committee, in answer to a question, said:

> "I can only say to the Senator that I do not think there was any estimate made as to the amount of revenue that would be raised by it."

And in response to further question, said:

> "I do not know what the members of the committee expected, but I have heard no one suggest any revenue would be raised by it. * * * My individual judgment is that no revenue will be raised by it" (*Ibid*, p. 620).

Senator Kenyon said:

> "Now that the Supreme Court in the original child labor case has decided that that law is unconstitutional, it seems to me perfectly proper and perfectly right that we should try to find some means of nullifying that action of the Supreme Court, and that is what we are trying to do. * * * Here the Supreme Court decided that our attempt through the interstate commerce clause of the Constitution to regulate this wrong was an unconstitutional way to get at it. Now we try another way, and pass that on to the Supreme Court for them to state whether or not it is constitutional legislation" (*Ibid*, p. 626).

Senator Lenroot said:

> "I am frank to say that, of course, that will result in the nonemployment of child labor" (*Ibid*, p. 623).

A careful consideration of the provisions in detail of the statute but verifies the first impression that this is not a taxing measure at all, but, as applied in this case, a simple congressional regulation of the hours of labor and minimum wages of wage-earners, a subject already regulated by the State,—for it is not to be forgotten that North Carolina has regulated this matter and that under such regulation children under twelve years of age are not permitted to work at all, and those under thirteen and over twelve years of age may work only in a prescribed way as apprentices (*Pell's Revisal, North Carolina Statutes*, Secs. 3362-3364). This tax is not imposed on any assumed profit accruing from, or privilege enjoyed in, the employment of children in a way disapproved by

congressional opinion—indeed, it was the attitude of the Government in maintaining the validity of the child labor law of 1916 that there is no economic advantage in the employment of children (*Government's Brief, Dagenhart Case,* p. 24); this is not even a tax on the sales, or the profits arising from the sales, of products in whose manufacture child labor was used; this is a tax of ten per cent. on all the profits made by a manufacturing concern which, even for a day during the taxable year, employs even one child under sixteen for more than eight hours. In its very details, although it is in a revenue statute, this measure is a penal enactment levying a penalty of ten per cent. of the year's profits for even a day's violation of the will of Congress. Under its terms such an incongruous situation as this might arise: An employer with one thousand men in his employ and with a profit for the year of $1,000,000, on account of the employment of one boy under sixteen years for nine hours in one day, must pay to the Government $100,000 so-called additional tax, but in fact penalty for one day's violation of congressional will as to employment of children.

It will be argued in favor of the validity of this statute, just as was argued in favor of the statute that was condemned in the *Dagenhart Case,* that it is on its face an exercise of a congressional power duly conferred by the Constitution, and that the Court may not look to the purpose of Congress in its enactment, or to its indirect, though necessary, effect. Perhaps the main reliance in this contention will be on the *McCray Case* (195 U. S., 27), but the first decision of the Supreme Court of the United States that will likely be cited is *Veazie Bank vs. Fenno* (8 Wall., 533), in which the Federal tax of ten per cent. on the issue of State Banks was sus-

tained. Looking at the official *syllabi* of that case, one would not be impressed with the view that that case, in its essentials, had to do at all with the present case: The first *syllabus* is that the tax on the issue of State Banks is not a direct tax such as to require apportionment among the several States according to their respective numbers; the second *syllabus* is as follows:

> "Congress, having undertaken in the exercise of undisputed constitutional power to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain by suitable enactments the circulation of any notes not issued under its own authority."

In other words, the Court looked to the ultimate end in view, and found that ultimate end within the undisputed constitutional power of Congress, and so upheld the enactment. Apply the same test to the present statute, and we find as the ultimate end in view of Congress the regulation of the hours of labor in mines and factories within the States—a purely local matter to which the Federal authority does not extend. In the body of the opinion in *Veazie Bank vs. Fenno* (p. 541), there is an expression of the Court significant in the present litigation:

> "There are indeed certain virtual limitations (on the power of taxation) arising from the principles of the Constitution itself. *It would undoubtedly be an abuse of the power* if so exercised as to impair the separate existence and independent self-government of the States, or *if exercised for ends inconsistent with the limited grants of powers in the Constitution.*"

In the *McCray case* (*supra*) the Court considered the constitutionality of a congressional enactment imposing an internal revenue tax of ten cents per pound on oleomargarine when artificially colored to look like butter. The Court held that enactment constitutional. In the argument of the case it was, of course, conceded that Congress had the right to impose, for revenue purposes, an excise tax on commodities. In the *License cases* (5 Wall, 462), the right of Congress to levy an excise tax on liquor had been sustained; Congress had, certainly since the Civil War, imposed excise taxes on tobacco; during the Spanish American War Congress had imposed an excise tax on sugar, and that had been sustained (*Spreckles vs. McLain*, 192 U. S., 397). There could therefore be no doubt of the right of Congress to impose a *bona fide* excise tax for revenue purposes on oleomargarine. The contention of those who opposed the validity of the enactment, therefore, involved the necessity of going *de hors* the statute, and bringing to the attention of the Court, from these outside sources, the view that a tax of ten cents per pound on this oleomargarine would be, considering the selling price obtained for the article, practically prohibitive, and of demonstrating to the Court, from this fact and from the discussions in Congress, that the real purpose of Congress in levying the statute was to prohibit or discourage the oleomargarine business, with the ultimate argument that the statute therefore had no relation to revenue and was invalid. The Court denied these contentions. Even in that case, though, the Court used this significant language (p. 64):

> "Let us concede that if a case was presented where the abuse of the taxing power was so

> extreme as to be beyond the principles which we have previously stated and where it was plain to the judicial mind that the power had been called into play not for revenue but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, that it would be the duty of the Courts to say that such an arbitrary act was not merely an abuse of a delegated power but was the exercise of an authority not conferred."

This *McCray Case* was cited and relied on by the Government in the *Dagenhart Case*, unavailingly. The distinction between the *McCray Case* and the case at bar is precisely the distinction that existed between the *McCray Case* and the *Dagenhart Case*. In the *McCray Case* the purpose and effect of the Congressional enactment was to be spelled out otherwise than by an inspection of the statute, and there would have been involved in the Court sustaining the contentions of those who attacked the validity of the statute a consideration, upon evidence, of the motives of the Federal legislature. In the *Dagenhart Case*, and equally in the case at bar, there is no need to resort to outside testimony in order to ascertain the motives of Congress. It is not a question of motives; it is a matter of the effect and necessary effect, of the statute read in the light of its own provisions.

In *Flint vs. Stone Tracy Co.* (220 U. S., 107), the Supreme Court of the United States sustained the excise tax levied on corporations measured by the income of the corporation affected. The tax there imposed was incontestibly a revenue measure, with no purpose or effect other than revenue for

the Federal Government. The Court held that the tax was a typical excise privilege tax; that the selection of corporations (individuals and partnerships not being included) is not an arbitrary and unjust selection; that Congress may tax the doctor and exempt the lawyer, tax the shoemaker and leave the tailor free; and that the familiar illustration of the legality of a discrimination between the brown haired and red haired man, the Protestant and the Catholic, is not to the purpose, for—

> "Corporate powers and privileges are not complexion and creed. They do have the attributes of property, they do make for gain, they do have relation to the ability to bear the burdens of the Government. And so they may be taxed as any other species of property, and a business conducted with their aid may be subjected to an excise, when the same business conducted without their aid is left free" (p. 141).

The classification in this *Flint Case* was a reasonable classification, and the tax was measured as to amount by a reasonable standard, to-wit: the income arising from the conduct of the business in which the privilege reasonably selected for taxation is used.

In the recent case of *United States vs. Doremus,* decided March 3, 1919, the Court upheld in its entirety a statute which required the registration of, and imposed a tax of one dollar per annum on, all producers, importers and dealers in opium, and made provision also aimed to confine sales by these producers, importers and dealers to registered dealers, those dispensing the drugs as physicians, and those who held legitimate prescriptions of

physicians. The provisions so confining sales of opium were held valid, but only as having relation to the real raising of revenue provided in the one dollar per annum tax on dealers. The Court said:

> "These provisions tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law * * *. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of revenue."

In this case, too, there is asserted what we have never contested, to-wit: that in the legitimate exercise of any of the powers of Congress—to regulate commerce, to impose taxes, or of any other power,—Congress may have a moral end, or what may be termed a "police purpose." The Court, though, in the *Doremus Case*, as in the *McCray Case*, recognized the limitation of the right of Congress:

> "Of course Congress may not in the exercise of Federal power, exert authority wholly reserved to the States. Many decisions of this court have so declared."

Chief Justice White delivered the opinion of the Court in the *McCray Case*. He also delivered the opinion of the Court in *Brushaber vs. Railroad Co.* (*supra*), in which the present income tax law was declared constitutional, and in the latter case he makes express and more emphatic the holding already quoted from the *McCray Case*:

> "And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine would have no ap-

> plication in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion" (p. 24).

Both these expressions have perhaps their original statement by the Supreme Court of the United States in the words of Chief Justice MARSHALL in *McCulloch vs. Maryland* (4 Wheat. 416, 423):

> "Should Congress in the execution of its powers adopt measures which are prohibitive; or should Congress under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the Government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land" (p. 423).

In *Fairbank vs. United States* (181 U. S., 283) there was involved the validity of the stamp tax on a foreign bill of lading, and the Court held that the tax was invalid as being tantamount to a tax on exports, and, therefore, in contravention of Section 9 of Article I of the Constitution which provides that no tax or duty shall be laid on articles exported from the United States. While the opinion of the Court was not unanimous, there was

no dissent from the following fine statement of a principle of constitutional law that, as it seems to us, should be constantly borne in mind, believing, as we do, that technicalities, subtleties and over-refinements are no more to be justified in the attempt to demonstrate the constitutionality and validity of a statute than in attempting to demonstrate its unconstitutionality and invalidity—that grants of powers, and restrictions on grants, contained in the Federal Constitution, are to be given the same simple and unforced construction:

> "As in accordance with the rules heretofore noticed the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed" (p. 290).

The Tenth Amendment, as well as Section 9 of Article 1, is a restriction on the powers of Congress —it reserves to the States, unimpaired, their police power, their power to regulate their own internal affairs.

III.

This Statute is unconstitutional and invalid because the classification is arbitrary and based on a condition outside and beyond the sphere of the tax levying power.

In the *McCray Case*, in which there was involved the validity of a levy of tax on artificially colored oleomargarine when there was no tax on butter artificially colored, the Court took pains to demonstrate the propriety of that classification. In the *Flint Case*, in which there was involved the validity of the excise tax levied on corporations, the Court took pains, as hereinbefore indicated, to differentiate the classification involved in that case from the discrimination between different individuals when there was no real distinction or difference. Congress may, so far as our contention in this case is concerned, levy a privilege tax on the business of manufacturing cotton goods, applicable equally to all cotton manufacturers, and such an act would not become or be invalid, although there was levied no tax on woolen manufacturers, and although it could be shown that the effect of the tax would be to drive half the cotton manufacturers out of the business; so, also, it may levy a privilege tax upon the business of practicing law, applicable equally to all lawyers, and such would not become invalid, though it could be shown that the effect of such would be to drive more than half of the lawyers out of the practice of the law. The right to make a classification reasonably based upon differences that fall within Federal authority is established; but the right to make classification based upon the

prior conduct of the taxpayer, or the casual act of the taxpayer, or the circumstances of the origin of the goods, is not valid, and has never been held valid as applied to any taxing power.

The authority of States to levy taxes is equal in dignity to the right of the Federal Government, and in the *Flint Case* (*supra*) the argument of the Federal authority to impose privilege taxes was declared analogous to the right of the States in the imposition of taxes, and with respect to this right of States to levy taxes the Court quoted from its own opinion in *Railroad Co. vs. Pennsylvania* (134 U. S., 232):

> "It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different classification rates upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their Constitution" (p. 160).

We are justified, therefore, in looking at the fate of State tax legislation, especially with respect to classification in the imposition of privilege taxes,

and where infringement by the State of the function of the Federal Government was alleged:

In *Western Union Telegraph Co. vs. Kansas* (216 U. S., 1) the Court considered a statute of the State of Kansas that required telegraph companies, *as a condition precedent to their right to engage in local business*, to pay into the State school fund a given percentage of their authorized capital, which represented all of their business and property everywhere. It is to be noted that this imposition of a tax was simply a condition precedent to the right of the Telegraph Company to engage in local business, and that the Telegraph Company might escape that liability by simply refraining from the conduct of local business—it was not a part of the statute to attempt to directly put any burden on interstate commerce. The validity of the tax was asserted in the court by the argument that the matter of the right of a corporation to engage in local business in the State was dependent upon the option of the State itself, and conditioned upon the assent of the State, and that, therefore, the State might impose such conditions as it saw fit. The Court, however, held the law invalid:

> "The statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first, pay into the State school fund a given per cent. of its authorized capital representing all its business and property everywhere, is a burden on its privilege to engage in that commerce, in that it makes both such commerce conducted by the company and its property outside of the State contribute to the support of the State schools. Such is the necessary effect of the

statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent. of its capital stock a 'fee' for the privilege of doing local business. To hold otherwise is to allow form to control substance." 216 U. S., 1, 37.)

In that case a minority of the Court vigorously dissented on the grounds indicated in the statement hereinbefore made of the argument in favor of the tax, but in *International Paper Co. vs. Massachusetts* (146 U. S., 135) the doctrine of the *Western Union Telegraph Case* was reviewed and definitely adopted by a unanimous Court:

> "6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State" (p. 142).

In these two cases there was involved an encroachment on the jurisdiction delegated to the Federal Government by the States, which encroachment was in the form of a privilege tax on the right to engage in local business; and the statutes were stricken down, notwithstanding the plenary right in the States, as already asserted by this Court, to exercise a broad discretion as to those things which it should tax and those things which it should exempt. It is difficult to differentiate those cases from the case at bar, unless it is to be assumed, what under our dual system of government is not

to be assumed, that the Federal Government is supreme, and the overlord of the States, not only in its own sphere, but in their sphere as well.

The rule laid down in *Billings vs Illinois* (188 U. S., 97) is equally applicable to privilege taxes imposed by State legislatures and the Federal Government:

> "Classification must be based on some reasonable ground. It cannot be a mere arbitrary selection."

The classification involved in this statute is not even based on the origin of the thing taxed—or the origin of the thing from the sale of which the income which is taxed is derived. It is a classification based on the conduct, during the year, of the taxpayer, and if his conduct at any time during the year is not in accordance with the will of Congress, he is penalized to the extent of ten per cent. of his profits—profits made not only in the course of his violation of the will of Congress, but in his whole business. A classification, though, based on origin, and not on the character of the thing taxed, has been condemned in the only cases, so far as we have been able to ascertain, in which the question has been presented. In *People vs. Raines* (136 N. Y. App. Div., 417; affirmed by the Court of Appeals in 198 N. Y., 539), the New York Court held unconstitutional a statute which forbade the sale of convict made goods without a license, such license to be issued by the annual payment of five hundred dollars to the State. In the course of its opinion the Court, discussing classification, said:

> "While the taxing power may be extended to all kinds of persons and property within

the State or may be restricted to certain kinds of limited area * * *, it is subject to the one great rule that all persons, under like circumstances, shall be treated in the same way. Persons and property may be classified for taxation, but such classification may not be arbitrary, unreasonable or capricious. * * * So that if we ignore in this statute its obvious purpose, writ so plain that all may read, namely, to prohibit by onerous and exasperating restrictions, under the guise of regulations, the buying and selling within this State of convict made goods, and treat it purely as a revenue or tax law, the inquiry is, is its classification unreasonable and capricious?

"The appellants say that it does not conflict with the rule of equality; that it puts into one class all who deal in convict made goods, and treats them all alike, and that is a reasonable classification. Let us see. That classification is based upon the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves. Clothing, household furniture, shoes, scrubbing brushes, brooms, harness, anything that can be made by hand or machinery, falls within one classification, provided the origin is the same.

"Substitute a State for a prison, and no one would be willing to say that a law which required all persons who might deal in goods, wares and merchandise made in New Jersey to take out a license would be valid; or, if it be objected that that would be a direct violation of the Federal Constitution, made in Troy, or in Schenectady, or in Buffalo. Take

another classification: that a license fee should be required for dealers in all goods made by machinery, or all goods made by hand. If such classification be valid, and if the purpose of the act, as is claimed, is to protect free labor from prison labor, why, in these days of contest between organized and unorganized labor, should not an act be passed which provided for such a license for selling all goods made in a shop which did not employ union labor, and then, if the advocates of a free shop were in power, repeal it, and provide for such license for all goods made in shops which employed union labor, or single out for license dealers in goods made in shops employing members of certain races, religious or political parties? All these classifications would be based on origin, as is that under consideration."

Another leading case in New York is the case of *People vs. Mensching* (187 N. Y., 8), in which case it was held that a transfer tax on the sale of corporate stocks measured by the number of shares, without consideration of the face value of the shares, was unconstitutional. In the course of its opinion, the Court said:

"The act now before us does not classify by arranging according to quality, but by arranging according to accident. While it places all corporate shares in a class, still it does not treat all members of the class alike, but without method or order bears heavily upon some and lightly upon others, which, in effect, is a further classification. * * * While the legislature has wide latitude in classification its

power in that regard is not without limitation, for the classification must have some basis, reasonable or unreasonable, other than mere accident, whim or caprice. There must be some support of taste, policy, difference of situation or the like, some reason for it even if it is a poor one. While the State can tax some occupations and omit others, can it tax only such members of a calling as have blue eyes or black hair? We have said that it could tax horses and leave sheep untaxed, but it does not follow that it could tax white horses and omit all others, or tax the sale of certificates printed on white paper and not those on yellow or brown. While one class may be made of horses and another of sheep, or even a class made of race horses, owing to the use made of them, without a shock to common sense, a classification limited to white horses would be so arbitrary as to amount to tyranny, because there would be no semblance of reason for it. * * * A classification of dealers in cigarettes into those selling at wholesale without the State and those selling at retail within the State was sustained on the ground that the two occupations are distinct (*Cook vs. Marshall County*, 196 U. S., 261, 274), but could dealers in any commodity be classified according to age, size or complexion?"

People vs. Raynes (*supra*), after quoting from *People vs. Mensching*, last quoted, states:

"It does not seem necessary to add anything to these felicitous illustrations of improper classification. *A classification by origin ap-*

plied to a vast variety of goods seems to be more unreasonable than any enumerated by the Court of Appeals" (italics ours).

IV.

A consideration of what would be involved in holding this Statute valid enforces the conclusion that it is invalid.

We have no purpose to attempt to draw fanciful conclusions as to the ultimate effect of a given decision of the Court, but it is wise to look in the face the logical and the inevitable effect of a decision—not what is likely to be its progressive and ultimate effect, but what is necessarily involved in it—the step, to quote Mr. Justice McKenna, that may be "from the deck to the sea."

Chief Justice Marshall, in *McCulloch vs. Maryland* (4 Wheat., 316, 431, said: "The power to tax involves the power to destroy." And Chief Justice White in *Knowlton vs. Moore* (178 U. S., 41, 60), said that: "The power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope." On this high authority, we maintain that whatever may be one's feeling as to the wisdom or unwisdom of permitting a boy under fourteen, under any circumstances, to work in a factory; or of permitting a boy under sixteen to work after a given hour in the evening;—if there is involved in the case

the right of Congress to regulate, under the guise of a tax levy, every relation of life,—if there is involved the departure from our Constitution and from our institutions that it seems to us who make this argument is involved here—then the right to tax should rigorously be confined to subjects which may, under the Federal Constitution, be lawfully embraced therein, even though it may happen that in this particular instance "no great harm may be caused by the exercise of the" authority. If the views of those who assert the constitutionality of this method are sound, there is no practical necessity, nor reason, for State Legislatures, and certainly none for constitutional amendments; therefore, those views are unsound and revolutionary.

The foregoing sentences, under this point, are in virtual repetition of sentences in the brief of us who opposed in this Court the validity of the Child Labor Law passed by Congress in the assumed exercise of its power to regulate interstate commerce. They are just as applicable to the present case. The statute calls the so-called tax an excise tax, but it may be said to fall within that classification of excise taxes called "privilege taxes," and for its basis it assumes that the employment of children in a way and for hours not approved by Congress, is a "privilege" to be exercised by the permission of the Federal Government for the enjoyment of which privilege the tax is levied. But substantially every State in the Union has made its own rules and regulations, dependent upon the condition of its own inhabitants, regulating the employment of children, their minimum ages and their hours of service, and has denounced as crimes the violations of these State prescribed regulations. The Government has never contended (unless it shall so contend in its brief

filed in this case) that the employment of children is an economic privilege, but has denounced it as "in and of itself immoral in character, and injurious to the general welfare" (*Government's Brief, Dagenhart case,* p. 48). This enactment is almost precisely like the imposition, as for the exercise of a privilege, on the property or income of men who beat their wives! If this statute is to be sustained, then any privilege tax may be sustained that puts into different classes those pursuing the same calling, or producing the same product, dependent upon their conducting themselves or not conducting themselves, as Congress deems they should conduct themselves, in matters heretofore deemed conclusively to be exclusively within the State's authority, or within the individual's own control. Perhaps no better expression can be given to this contention than was given, all unavailingly it is true, in the Senatorial debate already referred to, by Senator Thomas. In making this quotation we do not overlook the fact that it was addressed to a legislative body, and that this Court has other functions than the legislative body. This Court, though, does have the right and duty in this case, under the authority of the decisions of this Court already quoted with respect to this very taxing power, to take into account, not the probability of given congressional enactment, but the validity of such action if it is taken, in the instances mentioned by Senator Thomas, and the effect of this decision on the question of that validity:

> "The other day, I think in the city of Cleveland, there was a very serious strike. The employees of the local traction company, objecting to the employment of so many women, went

upon a strike because their protest against female employment went unheeded. How the matter was settled I do not pretend to say, but I can easily understand how, in the fierce competition for employment, rivalry and controversy more than State wide may present itself between men workers and women workers; and I can easily understand how, if legislation of this kind is to be passed and sustained, the same power may be resorted to by the successful element at the polls against the vanquished element.

"Let us suppose, for example, Mr. President—and I do not think the supposition is a violent one—that within the next 10 years the pressure of female employment upon male employment becomes so exciting and so drastic as to present a political issue to the voters of the country. In the meantime, woman suffrage has become an established fact. The States, whatever their legislation may be upon the subject in the meanwhile, will not present a uniform condition. That can be acquired only by national legislation.

"The side winning the election then comes to Congress for relief, and presents a bill, we will say, like this, if the men win, as they sometimes do, that every person operating any business situated in the United States where women have been employed or permitted to work during any portion of the taxable year, shall be taxed, we will say, 25 per cent. of the proceeds, of the gross proceeds, of the business. Of course, it is an attempt to apply the taxing power of the Constitution to the accomplishment of a greatly desired industrial condition which has been made an issue at the pre-

vious election. Or suppose the controversy becomes acute between organized and unorganized labor, and that unorganized labor, which was the more numerous, should succeed at the polls, and attempt, as it doubtless would, if that sort of legislation is to become generally recognized, to prohibit the employment of union labor anywhere in the United States by invoking against it the constitutional power of taxation. Then a bill is to be presented that every person operating businesses where organized labor has been employed or permitted to work, and so forth, should be taxed 25 per cent. or 50 per cent. or any other amount which may be necessary to make the real purpose of the bill effective.

"Suppose an anti-Semetic agitation in the United States, or an anti-German industrial agitation in the United States, within the immediate future, how easy it would be to exclude such persons, all such persons, from the possibility of earning a living in this free land of ours by so penalizing such employees through the exercise of the taxing power as to make it imposible for them to exercise their right.

"Mr. President, I foresee a great many very serious differences of an industrial and economic character which will certainly be evolved from this war, and upon the return of our millions of soldiers and upon their reabsorption into the industrial and economic life of this country another pressure upon Congress with the probable difficulty of securing employment. I greatly fear if we utilize this power and do it unduly and improperly, not consciously so, perhaps, but nevertheless improperly, we are

creating precedents which may arise to disturb us very seriously in the immediate future" (Congressional Record, Vol. 57, No. 16, p. 625).

Of course, the same penalty of heavy taxes can just as well be meted out to those who do not conform to Congressional ideas in the minimum wages they pay, in the employment or non-employment of colored as well as white labor, in the installation or non-installation of safety devices, as well as in the equal or unequal wages of female employees as compared with male employees, or in the recognition or non-recognition of the open shop or the closed shop. This is the elimination of the States as recognized by our Constitution, and the Congressional regulation of all the processes of production.

V.

The judgment of the District Court should be affirmed and the Statute declared unconstitutional.

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